

INDEX

	PAGE
Errata in Volumes I, II and III -----	III
Final Order -----	952
Opinion on Respondent's Objections to Proposed Order -----	954
Reprinted Exhibits (exhibits which were reproduced at the pages indicated but which are not completely legible):	
Commission's Exhibit No. 2200 (originally re- produced at pages 780-81) -----	956
Commission's Exhibit No. 2201-A (originally re- produced at page 782) -----	958
Commission's Exhibit No. 2201-B (originally re- produced at pages 784-85) -----	959
Respondent's Exhibit No. 77-A (originally re- produced at page 930) -----	961
Respondent's Exhibit No. 77-B (originally re- produced at page 931) -----	962
Respondent's Exhibit No. 79-A (originally re- produced at page 932) -----	963
Respondent's Exhibit No. 79-B (originally re- produced at page 933) -----	964
Respondent's Exhibit No. 79-C (originally re- produced at page 934) -----	965
Respondent's Exhibit No. 79-D (originally re- produced at page 935) -----	966
Respondent's Exhibit No. 79-E (originally re- produced at page 936) -----	967
Respondent's Exhibit No. 79-F (originally re- produced at page 937) -----	968
Respondent's Exhibit No. 79-G (originally re- produced at page 938) -----	969
Respondent's Exhibit No. 79-H (originally re- produced at page 939) -----	970
Respondent's Exhibit No. 79-I (originally re- produced at page 940) -----	971
Respondent's Exhibit No. 80 (originally repro- duced at page 941) -----	972
Respondent's Exhibit No. 81 (originally repro- duced at page 942) -----	973



III

ERRATA

<u>Page</u>	<u>Line</u>	<u>Change to be made</u>
4	15	Change "Bordon Label" in the middle column to "Buyer Label"
193	6	Insert at the end of the line, after "all", the words "of them. I don't know that I know all"
257	19	Insert after "A" and before "Vice versa" the word "And"
496	2	Insert, following this line, "A That's right."
510	8-9	Interchange these 2 lines
535	26	Insert at the end of the line, after "plant", the words "and go along on a status quo basis and then switch"
602	21	Insert, following this line, "A No, Sir."
699	2	Change "96" to "76"
719	26	Delete "ing its business."
736	11	Change "sir? If you don't have" to "to the purchaser, the"

FINAL ORDER

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

COMMISSIONERS:

Paul Rand Dixon, Chairman
Sigurd Anderson
Philip Elman
Everette MacIntyre
A. Leon Higginbotham, Jr.

In the Matter of

THE BORDEN COMPANY,
a corporation.

DOCKET NO. 7129

Respondent having filed, pursuant to the Commission's order of November 28, 1962, objections to the Commission's proposed order in this proceeding, reasons in support thereof, and a proposed alternative order, complaint counsel having filed a reply to the objections and respondent having filed a further statement with respect thereto; and

The Commission, for the reasons stated in the accompanying opinion, having rejected respondent's objections and having further determined that its proposed order to cease and desist should be issued as the final order of the Commission:

IT IS ORDERED that respondent The Borden Company, a corporation, its officers, representatives, agents and employees, directly or through any corporate or other device, in, or in connection with, the sale of food products in

commerce, as "commerce" is defined in the amended Clayton Act, do forthwith cease and desist from discriminating in the price of such products of like grade and quality by selling to any purchaser at a price higher than the price charged any other purchaser who, in fact, competes with the purchaser paying the higher price or with a customer of the purchaser paying the higher price.

The term "price" as used in this order means the net price after all discounts, including cash discount, rebates or other allowances, including damaged goods allowance, have been deducted.

IT IS FURTHER ORDERED that respondent The Borden Company, a corporation, shall, within sixty (60) days after service upon it of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with the order to cease and desist set forth herein.

By the Commission, Commissioner Elman dissenting and Commissioners Anderson and Higginbotham not participating.

(Signed) JOSEPH W. SHEA

Joseph W. Shea,
Secretary.

ISSUED: January 30, 1963.

OPINION ON RESPONDENT'S OBJECTIONS TO PROPOSED ORDER

(Number and Title Omitted)

Respondent, as provided in the Commission's order issued November 28, 1962, has filed its objections to the Commission's proposed order, a statement of its supporting reasons and its alternative form of order. Counsel supporting the complaint has filed a reply thereto, and respondent has also filed a further statement.

Respondent first requests that the Commission delete "food products" and substitute "evaporated milk." Evaporated milk, as the record shows, is but one of a number of food products manufactured and sold by respondent. Respondent sells food items such as Borden's Malted Milk, Borden's None-Such Mince Meat, Borden's Instant Hot Chocolate, Borden's Instant Coffee and Borden's Starlac (a powdered milk product), to name just a few. Borden's line of food products also includes items in the dairy field such as cheese, ice cream and fluid milk and other special products such as infant foods. Since the same or a similar price discrimination practice could be used as well for such other products, the order, to be effective, was made to include all "food products." See *Niresk Industries, Inc. v. Federal Trade Commission*, 278 F. 2d 337, 343 (7th Cir. 1960), cert. denied 364 U. S. 883; *Vanity Fair Paper Mills, Inc. v. Federal Trade Commission*, ____ F. 2d ____ (2nd Cir. 1962), 31 L. W. 2284. Respondent's request to narrow the order to cover only evaporated milk is rejected.

Respondent suggests the inclusion in the order of the following words: "in any case where (a) the lower price undercuts the price at which the purchaser buying at such lower price may buy from another seller, and (b) the lower price has not been offered to the purchaser buying at the higher price." This modification is rejected as inappro-

appropriate in light of the facts in this case and the type of order issued.

Respondent lastly requests that the following definition be included in the order: "The term 'purchaser' as used in this order means the person to whom the respondent sells and from whom the respondent receives payment." It asserts that this suggested modification is for the purpose of clarifying a claimed ambiguity as to the meaning of the proposed order. The order as written covers price discriminations where the purchaser paying the higher price or his customer competes with the purchaser paying the lower price.

We believe this order is clear and explicit in its application to the facts of this case. In the instance respondent mentions as resulting in the asserted ambiguity, the Commission found that wholesaler Thomas & Howard purchased the shipment in question through Biddle Purchasing Company. An order defining purchaser as requested could be interpreted as excluding the actual purchaser where payment is made through an agent or representative. That would be an inappropriate result. If a question should arise in the future as to the relationship between respondent and a party from which it receives payment for the shipment of goods, the matter can best be resolved under regular compliance procedures upon the basis of the facts shown in the particular instance. We, therefore, reject the respondent's request for defining purchaser in the order.

Commissioner Elman dissented to the decision herein and Commissioners Anderson and Higginbotham did not participate in the decision herein.

January 30, 1963

COMMISSION'S EXHIBIT NO. 2200

Customer—DIXIE HOME STORES

Address—Greenville, South Carolina

Broker—Biddle Terms—2% 10 Days Labels—Dixie Home

Allow 1/10% Swell Allowance Routing—CMSTP&P Monon—Southern

Prepaid ☒
 Freight ☒ —Collect

Date	Inv. No.	Number of Cases				Gross Billing	Labels	Freight	Brok.	Discount	Return & Allow.	Decline	Per Case	
		Tall	48-B	96-B	No. 10								Gross	Net
1952														
5-2	9220	1145	173			7,573.73							6.15	
5-15	9283	1145	227			7,739.78							6.15	
1955													5.55	
12-21	1838	1001	110			5,860.80							2.775	
12-27	1852	1001	110			5,881.92	(Winn-Dixie Stores—Columbia, S. C.)						5.57	
12-29	1869	1001	110			5,860.80							2.785	
1956													5.55	
1-6	1906	1001	110			5,860.80							2.775	
1-12	1931	1000	110			5,855.25							5.55	
12-26	3471	1101	300			7,168.23	Winn Dixie—Greenville, S. C.						2.775	
1957													5.73	
1-21	3593	1100	300			7,162.50	Winn Dixie—Greenville, S. C.						2.865	
1-21	3594	1100	200			6,876.00	Winn Dixie—Columbia, S. C.						5.73	
1-25	3631	1100	200			6,876.00	Winn Dixie—Columbia, S. C.						2.865	
1-28	3632	1101	300			7,168.23	Winn Dixie—Greenville, S. C.						5.73	
2-1	3670	1101	300			7,168.23	Winn Dixie—Greenville, S. C.						2.865	

COMMISSION'S EXHIBIT NO. 2200—continued

Customer—DIXIE HOME STORES, INC.

Address—Greenville, South Carolina

Broker—Biddle

Terms 2% 10 Days
Net 30 Days

Labels—Dixie Home

Routing—CMSTP&P—Monon—Southern

Prepaid
Freight—CollectLess 1/10th of 1% in
Lieu of Normal Swells

Date	Inv. No.	Tail	Number of Cases			Gross Billing	Labels	Freight	Brok.	Discount	Return & Allow.	Decline	Per Case	
			48-B	96-B	No. 10								Gross	Net
2-4-57	3674	1202				6,887.46	Winn Dixie—Greenville, S. C.						5.73	
2-6-57	3699	1101	200			6,881.73	Winn Dixie—Greenville, S. C.						5.73	
													2.865	
2-18-57	3748	1101	300			7,168.23	Winn Dixie—Greenville, S. C.						5.73	
													2.865	
2-25-57	3785	1100	200			6,876.00	" "			" "			5.73	
													2.865	
2-27-57	3803	1100	300			7,162.50	" "			" "			5.73	
													2.865	
3-1-57	3825	1200				6,876.00	" "			" "			5.73	
3-4-57	3830	1200				6,876.00	" "			" "			5.73	
													2.865	
3-11-57	3850	1200	640			8,709.60	" "			" "			5.73	
													2.865	
3-19-57	3880	1200	220			7,506.30	" "			" "			5.73	
													2.865	
4-2-57	3951	1200	220			7,506.30	" "			" "			5.73	
													2.865	
4-9-57	3973	1200	220			7,506.30	" "			" "			5.73	
													2.865	

21,357 Cs—12 months \$122,375.11

COMMISSION'S EXHIBIT NO. 2201-A

Customer—CENTRAL RETAILER-OWNED GROCERS, INC.

Address—155 North Wacker Drive—Chicago, Illinois

Broker—

Terms—Net 10 days

Labels—Shurfine

Routing—Howard's Cartage

Prepaid add Freight
Freight—xxxxx

Date	Inv. No.	Number of Cases				Gross Billing	Labels	Freight	Brok.	Discount	Return & Allow.	Decline	Per Case	
		Tall	48-B	96-B	No. 10								Gross	Net
1956														
6-27	2639	100				509.00	Associated Groc.							5.09
						2,481.38	United Grocers							5.09
7-17	2708	475	25			14,048.03								2.545

4677 Cs—12 months \$23,925.06

COMMISSION'S EXHIBIT NO. 2201-B

Customer—CENTRAL DIVISION—NATIONAL RETAILER-OWNED GROCERS, INC.

Prepaid
Freight—Collect

Address—308 West Washington Street, Chicago, Illinois

Less
.07 Cs

Broker—C.D. NROG Terms—10 Days Net Labels—Shurfine

Routing—

Date	Inv. No.	Number of Cases				Gross Billing	Labels	Freight	Brok.	Discount	Return & Allow.	Decline	Per Case	
		Tall	48-B	96-B	No. 10								Gross	Net
1954														
1-19	1150	400				1,998.00		+ 41¢ case Frt Chgs or \$164.00					4.99½	
2-1														
5-3	1687	100				471.50							4.715	
5-17	1727	350	100			1,886.05							4.715	
6-7	1801	376	50			1,860.64							4.64	
6-15	1885	450				2,088.00		+ 14¢ Cs Frt Chgs					4.64	
8-24	2264	350	100			1,887.20		+ 14¢ Cs Frt Chgs					4.718	
9-29	2436	100				479.80		+ 29½¢ Cs Cartage					4.798	
10-7	2495	400	50			2,063.38		+ 14¢ Cs Freight					4.855	
11-12	2716	400	50			2,063.38		+ 14¢ Cs Freight					4.855	
1955														
1-3	243	425				2,120.75		+ 14¢ Cs Freight					4.99	
2-2	376	402	50			2,173.43		+ 14¢ Cs Freight					5.09	
2-24	481	100				503.00		+ 29½¢ Cs "					5.03	
3-16	552	400	50			2,116.00		+ 14¢ Cs Freight					4.98	
3-22	580	100				498.00		+ 10¢ Cs Freight					2.49	4.98

Prepaid ☒ —Add Frt.
Freight—Collect

Broker—

Terms—

Routing—

Labels—Shurfine

Date	Inv. No.	Number of Cases				Gross Billing	Labels	Freight	Brok.	Discount	Return & Allow.	Decline	Per Case	
		Tall	48-B	96-B	No. 10								Gross	Net
1955														
5-10	781	100				489.20	Associated Grocers.						4.892	
6-9	934	400	50			2,052.33	United Grocers.						4.829	
7-26	1111	100				481.30	Associated Grocers.						2.4145	
7-27	1121	400	75			2,105.69	United Grocers Coop. Assn.						4.813	
9-12	1302	400	75			2,209.38	United Grocers Coop. Assn.						4.813	
10-14	1522	100				511.15	Associated Grocers.						2.4065	
11-2	1619	400	75			2,236.29	United Grocers Coop. Assn.						5.05	
11-28	1742	452				2,333.22	United Grocers Coop. Assn.						2.525	
1956													5.1115	
1-3	1898	100				520.70	Associated Grocers.						5.1115	
1-17	1952	425	75			2,408.70	United Grocers Coop. Assn.						2.604	
2-7	2044	100				517.50	Associated Grocers.						5.175	
2-8	2048	450				2,328.75	United Grocers Coop. Assn.						5.175	
4-11	2324	425	75			2,355.05	United Grocers Coop. Assn.						5.092	
5-1	2423	100				509.20	Associated Grocers.						2.546	
6-7	2551	400	100			2,417.75	United Grocers Coop. Assn.						5.09	

1957 SHIPMENTS INTO BROKERAGE DISTRICTS (INCLUDING QUANTITIES SHIPPED FROM RESERVE WAREHOUSES)
OF BORDEN BRAND EVAPORATED MILK SHOWING PERCENTAGE OF TOTAL SHIPMENTS BY PRODUCING PLANTS

Shipments		Percentage of Total Cases by Producing Plants							Shipments From Reserve Warehouses		
Brokerage District		Total Cases	Chester S.C.	Dixon Ill.	Ft. Scott Kans.	Lewisburg Tenn.	New London Wisc.	Perrinton Mich.	Wellsboro Pa.	Cases	Warehouses
any	N. Y.	36,697		19.6%			52.0%	11.8%	16.6%	10,585	2
ona	Pa.	47,865	3.3%	34.2			6.0	6.2	50.3	24,625	4
nta	Ga.	55,293	13.3	2.5		82.1%	2.1			16,122	3
usta	Ga.	23,086	79.1			15.9	5.0			3,666	1
more	Md.	132,609		1.0			36.7		62.3	17,255	1
ingham	Ala.	81,430	9.6	2.3		86.6	1.5			14,725	2
field	Va.	106,375	6.3	60.1		1.1	1.8	26.2	4.5	23,720	6
on	Mass.	105,730		6.0			67.7	4.9	21.4	35,535	5
lo	N. Y.	106,494		3.5			33.2	8.5	54.8	19,420	3
leston	S. C.	16,335	100.0							—	—
	W. Va.	21,090		71.2				14.8	14.0	6,780	3
lotte	N. C.	49,255	100.0							2,380	1
anooga	Tenn.	44,780	10.0	7.4		81.0	1.6			9,800	1
ago	Ill.	3,715		37.7			62.3			—	—
tsburg	W. Va.	68,651		64.5					16.1	21,070	4
eland	O.	1,685						100.0		—	—
mbus	O.	8,687		59.6				40.4		1,657	1
berland	Md.	49,900		49.5			2.8	19.6	28.1	13,325	4
is	Tex.	8,448		14.9	85.1%					—	—
er	Colo.	7,475			81.7		18.3			—	—
Moines	Ia.	1,525		100.0						—	—
oit	Mich.	6,220		30.7				69.3		—	—
ict of Columbia	D. C.	41,060	4.6	27.7			40.8	1.9	25.0	13,495	4
th	Minn.	3,850		82.3			17.7			—	—
aso	Tex.	37,603		48.4	51.6					—	—
	Pa.	8,420		25.1			16.5	16.7	41.7	2,800	2
o	N. D.	8,040		20.2			79.8			—	—
	Mich.	1,050						100.0		—	—
Worth	Tex.	6,900		50.4	29.7	19.9				—	—
nd Rapids	Mich.	2,100		30.9			17.9	51.2		—	—
msboro	N. C.	81,170	97.1	0.8			2.1			13,770	1
msville	S. C.	130,759	99.3	0.7						—	—
nton	Tex.	50,678		33.8	53.7	12.5				672	1
onville	Fla.	182,449	39.2	2.7		55.4	1.3		1.4	60,269	6
as City	Mo.	115		100.0						—	—
ville	Tenn.	39,485	6.9	8.8		79.0	5.3			8,320	1
ngton	Ky.	2,095		66.1				33.9		—	—
Island	N. Y.	22,355		10.1			62.7	10.7	16.5	6,225	2
ville	Ky.	4,615		68.9		31.1				—	—
on	Ga.	11,324				89.6	10.4			2,459	2
Total (page one) . .		1,617,413								328,675	60

1957 SHIPMENTS INTO BROKERAGE DISTRICTS (INCLUDING QUANTITIES SHIPPED FROM RESERVE WAREHOUSES)
OF BORDEN BRAND EVAPORATED MILK SHOWING PERCENTAGE OF TOTAL SHIPMENTS BY PRODUCING PLANTS

[illegible]



RESPONDENT'S EXHIBIT NO. 79-A

1957 SHIPMENTS INTO BROKERAGE DISTRICTS (INCLUDING
QUANTITIES SHIPPED FROM RESERVE WAREHOUSES)
OF BORDEN BRAND EVAPORATED MILK PRODUCED
AT CHESTER, S. C. PLANT

Shipments			Shipped from Reserve Warehouses	
Brokerage District	Cases	% of Total	Cases	Warehouses
Altoona	Pa. 1,600	.3%	—	—
Atlanta	Ga. 7,355	1.2	—	—
Augusta	Ga. 18,270	3.1	—	—
Birmingham	Ala. 7,825	1.3	—	—
Bluefield	Va. 6,665	1.1	6,665	1
Charleston	S. C. 16,335	2.7	—	—
Charlotte	N. C. 49,255	8.3	2,380	1
Chattanooga	Tenn. 4,485	.8	—	—
District of Columbia	D. C. 1,890	.3	—	—
Greensboro	N. C. 78,845	13.2	13,770	1
Greenville	S. C. 129,859	21.8	—	—
Jacksonville	Fla. 71,471	12.0	30,111	1
Knoxville	Tenn. 2,725	.5	—	—
Memphis	Tenn. 800	.1	—	—
Miami	Fla. 31,675	5.3	11,010	1
Mobile	Ala. 12,675	2.1	—	—
Montgomery	Ala. 1,985	.3	—	—
New Orleans	La. 19,790	3.3	—	—
Norfolk	Va. 32,350	5.4	10,950	1
Pensacola	Fla. 1,450	.2	—	—
Richmond	Va. 12,160	2.0	5,655	1
Roanoke	Va. 27,270	4.6	11,790	1
San Antonio	Tex. 1,200	.2	—	—
Savannah	Ga. 40,880	6.9	—	—
Tampa	Fla. 6,950	1.2	1,600	1
Wilmington	N. C. 10,900	1.8	—	—
Total	596,665	100.0%	93,931	9

RESPONDENT'S EXHIBIT NO. 79-B

1957 SHIPMENTS INTO BROKERAGE DISTRICTS (INCLUDING
QUANTITIES SHIPPED FROM RESERVE WAREHOUSES)
OF BORDEN BRAND EVAPORATED MILK PRODUCED AT
DIXON, ILL. PLANT

Shipments			Shipped from Reserve Warehouses	
Brokerage District	Cases	% of Total	Cases	Warehouses
Albany	N. Y. 7,195	1.2	—	—
Altoona	Pa. 16,375	2.8	12,600	3
Atlanta	Ga. 1,395	.2	—	—
Baltimore	Md. 1,400	.2	—	—
Birmingham	Ala. 1,915	.3	—	—
Bluefield	Va. 63,960	11.0	11,050	3
Boston	Mass. 6,325	1.1	650	1
Buffalo	N. Y. 3,750	.6	2,900	2
Charleston	W. Va. 15,020	2.6	5,280	2
Chattanooga	Tenn. 3,300	.6	—	—
Chicago	Ill. 1,400	.2	—	—
Clarksburg	W. Va. 44,261	7.6	11,625	3
Columbus	O. 5,182	.9	1,657	—
Cumberland	Md. 24,695	4.2	5,605	—
Dallas	Tex. 1,260	.2	—	—
Des Moines	Ia. 1,525	.3	—	—
Detroit	Mich. 1,910	.3	—	—
District of Columbia	D. C. 11,360	2.0	8,010	—
Duluth	Minn. 3,170	.5	—	—
El Paso	Tex. 18,207	3.1	—	—
Erie	Pa. 2,110	.4	700	—
Fargo	N. D. 1,625	.3	—	—
Ft. Worth	Tex. 3,475	.6	—	—
Grand Rapids	Mich. 650	.1	—	—
Greensboro	N. C. 625	.1	—	—
Greenville	S. C. 900	.2	—	—
Houston	Tex. 17,140	2.9	—	—
Jacksonville	Fla. 4,950	.9	—	—
Kansas City	Mo. 115	.0	—	—
Knoxville	Tenn. 3,475	.6	—	—
Lexington	Ky. 1,385	.2	—	—
Long Island	N. Y. 2,250	.4	—	—
Louisville	Ky. 3,180	.6	—	—
Memphis	Tenn. 1,350	.2	—	—
Miami	Fla. 1,050	.2	—	—
Milwaukee	Wisc. 250	.0	—	—
Monroe	La. 1,200	.2	—	—
Montgomery	Ala. 625	.1	—	—
New Haven	Conn. 2,656	.5	620	—
New Jersey	N. J. 18,550	3.2	9,115	—
Total (Fwd.) ..	301,166	51.7	69,812	—

RESPONDENT'S EXHIBIT NO. 79-C

1957 SHIPMENTS INTO BROKERAGE DISTRICTS (INCLUDING
QUANTITIES SHIPPED FROM RESERVE WAREHOUSES) OF
BORDEN BRAND EVAPORATED MILK PRODUCED AT
DIXON, ILL. PLANT

Shipments			Shipped from Reserve Warehouses	
Brokerage District	Cases	% of Total	Cases	Warehouses
Total (Fwd.) ..	301,166	51.7	69,812	26
New Orleans La.	8,460	1.5%	—	—
New York N. Y.	6,325	1.1	1,190	1
Norfolk Va.	21,625	3.7	3,100	1
Omaha Neb.	5,140	.9	—	—
Pensacola Fla.	690	.1	—	—
Philadelphia Pa.	49,052	8.5	23,000	3
Pittsburgh Pa.	57,525	9.9	27,285	4
Portland Me.	2,805	.5	—	—
Providence R. I.	5,320	.9	—	—
Richmond Va.	46,600	8.3	8,425	3
Roanoke Va.	41,335	7.1	3,475	1
Rochester N. Y.	1,350	.2	—	—
San Antonio Tex.	7,825	1.3	—	—
Savannah Ga.	1,775	.3	—	—
Scranton Pa.	9,855	1.7	1,990	1
Syracuse N. Y.	13,925	2.4	600	1
Total	580,773	100.0%	138,844	41

RESPONDENT'S EXHIBIT NO. 79-D

1957 SHIPMENTS INTO BROKERAGE DISTRICTS (INCLUDING
QUANTITIES SHIPPED FROM RESERVE WAREHOUSES) OF
BORDEN BRAND EVAPORATED MILK PRODUCED AT
FT. SCOTT, KANS. PLANT

Shipments				Shipped from Reserve Warehouses	
Brokerage District		Cases	% of Total	Cases	Warehouses
Dallas	Tex.	7,188	4.9%	—	—
Denver	Colo.	6,105	4.1	—	—
El Paso	Tex.	19,396	13.1	—	—
Ft. Worth	Tex.	2,050	1.4	—	—
Houston	Tex.	27,191	18.4	—	—
Mobile	Ala.	650	.4	—	—
Monroe	La.	690	.5	—	—
New Orleans	La.	60,705	41.1	—	—
Omaha	Neb.	10,930	7.4	—	—
San Antonio	Tex.	12,150	8.2	—	—
Waco	Tex.	760	.5	—	—
Total		<u>147,815</u>	<u>100 %</u>	<u>None</u>	

RESPONDENT'S EXHIBIT NO. 79-E

1957 SHIPMENTS INTO BROKERAGE DISTRICTS (INCLUDING
QUANTITIES SHIPPED FROM RESERVE WAREHOUSES) OF
BORDEN BRAND EVAPORATED MILK PRODUCED AT
LEWISBURG, TENN. PLANT

Shipments			Shipped from Reserve Warehouses	
Brokerage District	Cases	% of Total	Cases	Warehouse
Atlanta	Ga. 45,393	6.6%	16,122	3
Augusta	Ga. 3,666	.5	3,666	1
Birmingham	Ala. 70,490	10.3	14,725	2
Bluefield	Va. 1,200	.2	1,200	1
Chattanooga	Tenn. 36,270	5.3	9,800	1
D. Worth	Tex. 1,375	.2	—	—
Houston	Tex. 6,347	.9	672	1
Jacksonville	Fla. 101,038	14.7	27,558	4
Knoxville	Tenn. 31,185	4.5	8,320	1
Louisville	Ky. 1,435	.2	—	—
Macon	Ga. 10,149	1.5	2,459	2
Memphis	Tenn. 17,385	2.5	—	—
Miami	Fla. 31,075	4.5	19,400	4
Mobile	Ala. 52,105	7.6	17,175	2
Monroe	La. 7,260	1.1	3,510	1
Montgomery	Ala. 15,360	2.2	5,215	3
Nashville	Tenn. 8,115	1.2	—	—
New Orleans	La. 190,165	27.8	69,795	4
Pensacola	Fla. 23,710	3.5	6,245	1
San Antonio	Tex. 1,750	.3	—	—
Savannah	Ga. 19,050	2.8	17,025	4
Tampa	Fla. 10,650	1.6	3,100	2
Total	685,173	100.0%	225,987	37

RESPONDENT'S EXHIBIT NO. 79-F

1957 SHIPMENTS INTO BROKERAGE DISTRICTS (INCLUDING
QUANTITIES SHIPPED FROM RESERVE WAREHOUSES)
OF BORDEN BRAND EVAPORATED MILK PRODUCED AT
NEW LONDON, WISC. PLANT

Shipments		% of Total	Shipped from Reserve Warehouses	
Brokerage District	Cases		Cases	Warehouses
Albany	N. Y. 19,095	3.3%	7,385	1
Altoona	Pa. 2,850	.5	—	—
Atlanta	Ga. 1,150	.2	—	—
Augusta	Ga. 1,150	.2	—	—
Baltimore	Md. 48,639	8.5	—	—
Birmingham	Ala. 1,200	.2	—	—
Bluefield	Va. 1,925	.3	—	—
Boston	Mass. 71,610	12.5	13,925	2
Buffalo	N. Y. 35,340	6.2	—	—
Chattanooga	Tenn. 725	.1	—	—
Chicago	Ill. 2,315	.4	—	—
Cumberland	Md. 1,400	.2	—	—
Denver	Colo. 1,370	.2	—	—
Dist. of Columbia	D. C. 16,750	2.9	—	—
Duluth	Minn. 680	.1	—	—
Erie	Pa. 1,390	.2	—	—
Fargo	N. D. 6,415	1.1	—	—
Grand Rapids	Mich. 375	.1	—	—
Greensboro	N. C. 1,700	.3	—	—
Jacksonville	Fla. 2,390	.4	—	—
Knoxville	Tenn. 2,100	.4	—	—
Long Island	N. Y. 14,020	2.5	4,875	1
Macon	Ga. 1,175	.2	—	—
Memphis	Tenn. 1,600	.3	—	—
Miami	Fla. 2,825	.5	—	—
Monroe	La. 750	.1	—	—
Montgomery	Ala. 665	.1	—	—
Nashville	Tenn. 1,350	.2	—	—
New Haven	Conn. 25,783	4.5	4,717	1
New Jersey	N. J. 44,775	7.8	—	—
New Orleans	La. 26,175	4.6	—	—
New York	N. Y. 96,172	16.8	12,407	1
Omaha	Neb. 1,350	.2	—	—
Philadelphia	Pa. 23,088	4.0	—	—
Pittsburgh	Pa. 2,165	.4	—	—
Portland	Me. 10,625	1.9	1,310	1
Providence	R. I. 59,950	10.4	9,050	2
Richmond	Va. 2,365	.4	—	—
Roanoke	Va. 2,540	.5	—	—
Rochester	N. Y. 9,675	1.7	3,400	1
Total (Fwd.) ..	547,617	95.2	57,069	10

RESPONDENT'S EXHIBIT NO. 79-G

1957 SHIPMENTS INTO BROKERAGE DISTRICTS (INCLUDING
QUANTITIES SHIPPED FROM RESERVE WAREHOUSES) OF
BORDEN BRAND EVAPORATED MILK PRODUCED AT
NEW LONDON, WISC. PLANT

Shipments			Shipped from Reserve Warehouses	
Brokerage District	Cases	% of Total	Cases	Warehouses
Total (Fwd.) ..	547,617	95.2	57,069	10
Savannah Ga.	2,200	.4%	—	—
Scranton Pa.	4,103	.7	—	—
Syracuse N. Y.	16,700	2.9	5,555	1
Tampa Fla.	3,400	.6	—	—
Total ...	574,020	100.0%	62,624	11

RESPONDENT'S EXHIBIT NO. 79-H

1957 SHIPMENTS INTO BROKERAGE DISTRICTS (INCLUDING
QUANTITIES SHIPPED FROM RESERVE WAREHOUSES) OF
BORDEN BRAND EVAPORATED MILK PRODUCED AT
PERRINTON, MICH. PLANT

Shipments				Shipped from Reserve Warehouses	
Brokerage District		Cases	% of Total	Cases	Warehouses
Albany	N. Y.	4,317	1.9%	—	—
Altoona	Pa.	2,950	1.3	—	—
Bluefield	Va.	27,820	12.5	725	1
Boston	Mass.	5,165	2.3	1,640	1
Buffalo	N. Y.	9,070	4.1	—	—
Charleston	W. Va.	3,110	1.4	—	—
Clarksburg	W. Va.	13,355	6.0	710	1
Cleveland	O.	1,685	.8	—	—
Columbus	O.	3,505	1.6	—	—
Cumberland	Md.	9,790	4.4	2,110	1
Detroit	Mich.	4,310	1.9	—	—
Dist. of Columbia	D. C.	800	.4	—	—
Erie	Pa.	1,410	.6	—	—
Flint	Mich.	1,050	.5	—	—
Grand Rapids	Mich.	1,075	.5	—	—
Lexington	Ky.	710	.3	—	—
Long Island	N. Y.	2,400	1.1	—	—
New Haven	Conn.	2,935	1.3	2,235	1
New Jersey	N. J.	10,170	4.6	5,395	1
New York	N. Y.	10,006	4.5	—	—
Norfolk	Va.	12,250	5.5	—	—
Philadelphia	Pa.	22,121	9.9	1,600	1
Pittsburgh	Pa.	15,060	6.7	—	—
Portland	Me.	5,295	2.4	—	—
Providence	R. I.	11,205	5.0	3,030	1
Richmond	Va.	11,380	5.1	—	—
Roanoke	Va.	12,320	5.5	—	—
Rochester	N. Y.	3,375	1.5	—	—
Scranton	Pa.	2,575	1.2	1,200	1
Syracuse	N. Y.	11,465	5.2	2,170	1
Total		222,679	100.0%	20,815	10

RESPONDENT'S EXHIBIT NO. 79-1

1957 SHIPMENTS INTO BROKERAGE DISTRICTS (INCLUDING QUANTITIES SHIPPED FROM RESERVE WAREHOUSES) OF BORDEN BRAND EVAPORATED MILK PRODUCED AT WELLSBORO, PA.

Shipments				Shipped from Reserve Warehouses	
Brokerage District		Cases	% of Total	Cases	Warehouses
Albany	N. Y.	6,090	1.2%	3,200	1
Altoona	Pa.	24,090	4.7	12,025	1
Baltimore	Md.	82,570	15.9	17,255	1
Bluefield	Va.	4,805	.9	4,080	1
Boston	Mass.	22,630	4.4	19,320	3
Buffalo	N. Y.	58,334	11.2	16,520	1
Charleston	W. Va.	2,960	.6	1,500	1
Clarksburg	W. Va.	11,035	2.1	8,735	1
Cumberland	Md.	14,015	2.7	5,610	1
Dist. of Columbia	D. C.	10,260	2.0	5,485	1
Erie	Pa.	3,510	.7	2,100	1
Jacksonville	Fla.	2,600	.5	2,600	1
Long Island	N. Y.	3,685	.7	1,350	1
New Haven	Conn.	13,700	2.6	10,230	3
New Jersey	N. J.	25,340	4.9	15,310	2
New York	N. Y.	17,323	3.4	7,313	2
Norfolk	Va.	1,200	.2	1,200	1
Philadelphia	Pa.	43,714	8.4	14,850	2
Pittsburgh	Pa.	55,840	10.8	17,930	1
Portland	Me.	5,145	1.0	5,145	2
Providence	R. I.	19,483	3.7	16,883	3
Richmond	Va.	3,565	.7	2,855	1
Roanoke	Va.	7,730	1.5	3,610	1
Rochester	N. Y.	7,695	1.5	2,495	1
Savannah	Ga.	3,025	.6	3,025	1
Scranton	Pa.	57,286	11.1	25,220	2
Syracuse	N. Y.	10,675	2.0	2,725	1
Total		518,305	100.0%	228,571	38

RESPONDENT'S EXHIBIT NO. 80

THE BORDEN COMPANY
 1957 PRIVATE LABEL SALES (TALL SIZE BASIS)
 BY PLANT

<u>Customer</u>	<u>Percentage of Total Cases</u>	<u>Total Cases</u>	<u>Albany</u>	<u>Chester</u>	<u>Dixon</u>	<u>Fort Scott</u>	<u>Lewisburg</u>	<u>Modesto</u>	<u>New London</u>	<u>Perrinton</u>	<u>Wellsboro</u>
Biddle	25.8	284,752		149,756	917.5		111,578.5				22,500
CROG	11.4	125,970			23,400	66,958	28,311		6,700	601	
Safeway	26.4	291,725.5	68,354.5		9,668	124,303					89,400
Topco	12.8	141,950			14,391.5	42,026	34,789.5		1,306	2,506	46,931
Total	76.4	844,397.5	68,354.5	149,756	48,377	233,287	174,679		8,006	3,107	158,831
All other	23.6	260,299.5	147,812.5	1,450	1,989.5	—	11,250	89,774.5	—	—	8,023
Total	100.	1,104,697	216,167	151,206	50,366.5	233,287	185,929	89,774.5	8,006	3,107	166,854

RESPONDENT'S EXHIBIT NO. 81

THE BORDEN COMPANY

PACKAGES OF ADVERTISED BRANDS SOLD THROUGH REGULAR CHANNELS

Product	Standard Units Sold					No. of Packages Per Standard Unit	Total No. Pkgs.	Percentage of Total
	Eastern Div.	Central Div.	Southern Div.	Western Div.	Total			
Eagle	83,942.00	139,221.00	291,062.00	97,831.00	612,056.00	24	14,689,344.00	
							14,689,344.00	4.68%
Other Condensed	80,356.00	477.00	315,502.00	—	396,335.00	24	9,512,040.00	
							9,512,040.00	3.03%
B. B. Evap.								
Confectioners	5,041.50	943.00	504.00	4,015.00	10,503.50	6	63,021.00	
Tall 48	1,724,853.04	200,958.50	1,647,591.00	359,720.00	3,933,122.54	48	188,789,881.92	
Small 48 and Small 96	140,367.00	2,419.00	150,038.50	66,583.50	359,408.00	96	34,503,168.00	
Total	1,870,261.54	204,320.50	1,798,133.50	430,318.50	4,303,034.04		223,356,070.92	71.14%
Malt								
One Pound	48,843.48	77,591.75	29,770.00	38,029.50	194,224.73	12	2,330,696.76	
Five Pound	15.80	220.41	—	365.00	611.21	2.4	1,466.90	
Total	48,859.28	77,812.16	29,770.00	38,394.50	194,835.94		2,332,163.66	.74%
Stemo	10,048.00	3,963.00	13,494.00	19,570.67	47,075.67	12	564,908.04	
							564,908.04	.18%
Spiced Meat								
9 ounce	91,811.06	98,276.00	69,976.00	50,309.00	310,372.06	24	7,448,929.44	
8 ounce	87,550.17	89,921.33	31,314.00	42,618.00	251,403.50	12	3,016,842.00	
Total	179,361.23	188,197.33	101,290.00	92,927.00	561,775.56		10,465,771.44	3.33%
Coffee	749,903.19	347,883.91	308,161.56	135,216.48	1,541,165.14	12	18,493,981.68	
							18,493,981.68	5.89%
Quaker								
quart	—	1.00	—	—	1.00	288	288	
1 qt and 5 qt	373,801.50	228,069.21	375,145.00	85,919.00	1,062,934.71	24	25,510,433.04	
1 qt and 12 qt	149,440.00	124,773.00	158,085.00	138,400.00	570,698.00	12	6,848,376.00	
Total	523,241.50	352,843.21	533,230.00	224,319.00	1,633,633.71		32,359,097.04	10.31%
Dark Chocolate								
Syrup and 8 oz	24,095.41	4,778.25	7,622.00	10,664.35	47,160.01	24	1,131,840.24	
One pound	32,251.25	21,891.17	13,632.00	21,767.25	89,541.67	12	1,074,500.04	
Total	56,346.66	26,669.42	21,254.00	32,431.60	136,701.68		2,206,340.28	.70%
Total	3,602,319.40	1,341,387.53	3,411,897.06	1,071,008.75	9,426,612.74		313,979,717.06	100.00%

[fol. 974] MINUTE ENTRY OF ARGUMENT AND SUBMISSION—
September 29, 1964
(omitted in printing)

[fol. 975] IN THE UNITED STATES COURT OF APPEALS FOR
THE FIFTH CIRCUIT

No. 20463

THE BORDEN COMPANY, Petitioner,
versus

FEDERAL TRADE COMMISSION, Respondent.

On Petition for Review of an Order of the Federal Trade
Commission

OPINION—December 4, 1964

Before HUTCHESON, RIVES and BROWN, Circuit Judges.

HUTCHESON, Circuit Judge: This is a petition by the Borden Company to review and set aside a cease and desist order of the Federal Trade Commission¹ based upon its decision that Borden had violated Section 2(a) of the Clayton Act as amended by the Robinson-Patman Act, 15 U.S.C. 13(a), the pertinent portion of which provides:

“It shall be unlawful . . . to discriminate in price between different purchasers of commodities of like grade [fol. 976] and quality . . . where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of

¹ The Commission, with two members not participating and one member dissenting, entered its order with the concurrence of two of its five members.

either of them: *Provided*, That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered: . . ."

The challenged order is based on the Commission's decision that Borden violated Section 2(a) by discriminating in price between purchasers of its private label evaporated milk, sold under brand labels owned by the customer, and purchasers of its Borden brand evaporated milk.

The Borden Company is engaged in the manufacture, processing, distribution and sale of food, dairy and chemical products. Since about 1938 it has been selling both Borden brand and private label evaporated milk. (The use of the term "milk" in this opinion is intended to refer only to evaporated milk.) The Borden brand, like the Carnation and Pet brands, was sold on a delivered price basis which was uniform throughout the country. The private label milk was sold by Borden on an f.o.b. plant basis, with prices determined under a cost-plus formula. In 1956 and 1957 Petitioner expanded its private label operations to its [fol. 977] two southern plants, located at Lewisburg, Tennessee, and Chester, South Carolina, which had not previously packed private label milk. As a result of these new operations some private label business which had been served by other packers shifted to Borden. This litigation ensued.

Borden has always sold its private label evaporated milk at lower prices than its Borden brand evaporated milk. The record indicates that it made no general offer to sell private label milk, nor did it solicit such orders. The customers who were supplied with the private label product approached Borden and asked it to make the private label milk available in addition to the Borden brand. These customers all continue to buy and stock the Borden brand along with their own private label brand. The private label milk which Borden sells is chemically identical to Borden

brand and is packed in the same way except that private brand labels belonging to the customer are put on the cans instead of the Borden brand labels. The private label milk is sold f.o.b. at a price determined by a cost-plus formula through which Borden adds a margin of profit to the actual cost of producing the milk at the particular plant from which it is shipped. The private label price varies from plant to plant and from month to month at each plant, but is always substantially lower than the Borden brand price which is uniform throughout the country. It is this difference in price between Borden brand milk and private label milk that the Commission attacks as price discrimination. [fol. 978] The Hearing Examiner found Borden had discriminated in price between purchasers of the Borden brand and private label milk and that such products were of like grade and quality, but he found that this practice had not injured competition and that it was not likely to injure competition, and that, in any event, the difference in price had been cost justified. He ordered the complaint dismissed, but the Commission reversed the Examiner and found potential injury in both the primary and secondary lines of competition and rejected Borden's cost justification defense. It ordered Petitioner to cease and desist from discriminating in price between competing purchasers of food products of like grade and quality.

Our initial determination must necessarily be whether or not the Commission applied the correct legal test in deciding that the commodities sold at different prices were of "like grade and quality". The facts on this element of the case are undisputed. The question is purely one of law, turning on the proper construction of the statutory phrase "of like grade and quality". If the products were not of like grade and quality, within the meaning of the Act, then their sale does not fall within the prohibition of Section 2(a). It is vigorously asserted by the Petitioner that Borden brand evaporated milk and the private label evaporated milk sold by Borden are not "commodities of like grade and quality".

The Commission's finding that Borden brand evaporated milk and the private label milk produced and sold by Bor-

den are of like grade and quality is based on the undisputed fact that the chemical content of the products is identical. [fol. 979] They are packed exactly the same except that the private label milk does not bear the Borden brand label. The private label milk bears the brand owned by the purchaser for whom it is packed. Its label does not show that the milk was packed or in any manner handled by Borden. Under the construction of the Act adopted here by the Commission the "like grade and quality" determination was based solely on the physical properties of the products without regard to the brand names they bear or the relative public acceptance enjoyed by each.

Borden contends that the grade and quality of products may vary either because of differences in "intrinsic superior quality" or because of "intense public demand" for one product as compared with another. It asserts that a sharp distinction between premium and non-premium products prevails in the evaporated milk business and that there are three well-known premium brands (Carnation, Pet, and Borden) which customarily command a substantially higher price than the other brands. It contends that private label milk, regardless of who packs it, must be sold at lower prices. Petitioner says the higher price commanded by Borden brand at all levels of distribution is due to the "intense public demand" for the product rather than to any "intrinsic superior quality". Borden puts the same milk in the private label cans as in the Borden brand cans. Chemically, the two products are the same, but Petitioner asserts, commercially, they are quite different. One is a premium product, the other nonpremium, Borden contends, and they should be priced accordingly.

[fol. 980] The record clearly establishes that Borden brand evaporated milk does command a higher price than private label milk at all levels of distribution. Customers at the retail level are willing to pay more for it than for private label because of the Borden name.² The wholesalers who testified

² For example, one retail grocer testified as follows:

"A. Some people say they want [Borden's] Silver Cow milk. In other words, for maybe a coupon on the side of

recognized that private label milk customarily sells at prices substantially below the premium price commanded by Borden brand milk and the other nationally advertised brands.³ That the Borden brand is recognized at the manufacturer's level as a premium product is illustrated by the fact that the wholesalers and retailers who bought private label milk from Borden at the lower prices nevertheless kept right on buying Borden brand, at the higher price, in approximately the same quantities. They, in effect, treated one as a premium line, the other as non-premium, recognizing that the Borden brand milk would command a higher price on resale than would the private label milk.

The basic issue presented here then is whether the demonstrated consumer preference for the Borden brand product [fol. 981] over the private label product is to receive legal recognition in the "like grade and quality" determination. The legislative history of the Act is of little assistance on this point. The members of the Attorney General's National Committee to Study the Antitrust Laws were divided on the question,⁴ as are the antitrust commentators.⁵ We find no case which controls our disposition of this issue.

the can or because they have been educated to want that brand. Some of them won't have anything but that. Some of them won't have anything except Carnation, and some of them won't want anything except Pet.

"Q. They don't care what price——

"A. If the doctor tells the woman to put the baby on Pet milk, that is all she wants, you couldn't interest her in something else."

³ As one wholesaler put it, "Private label merchandise is no good for nobody unless there is a price on it. . . . In the retail trade as a whole they haven't been too much interested in [private label evaporated milk] . . . frankly if it was the same price as advertised or 15 cents or 25 cents a case under, it wouldn't sell, they couldn't give it away. . . . It has got to have \$1.50 or \$2 a case spread to make it interesting."

⁴ The majority of the Committee recommended that the economic factors inherent in brand names and national ad-

In construing the Robinson-Patman Act we are mindful of the language of the Supreme Court in *Automatic Canteen Co. v. F.T.C.*, 346 U.S. 61 (1953). The court there said the Act should be interpreted and applied consistently with "the broader antitrust policies that have been laid down by Congress" and so to avoid "a price uniformity and rigidity in open conflict with the purposes of other antitrust legislation".⁶ Were we to ignore the fact that a brand name product may be able to command a higher price than an unknown brand because of its public acceptance, then we would be encouraging just such a price [fol. 982] uniformity and rigidity, in conflict with the realities of the marketplace and congressional antitrust policies. An established brand name may have a large following among purchasers. This fact can be of great economic significance in a competitive market. We do not believe it was the intention of Congress that such clearly demonstrable consumer preferences should simply be ignored in determining when products may be priced differently. As a practical matter, such preferences may be far more significant in determining the market value of a product than

vertising should not be considered in the jurisdictional inquiry under the statutory "like grade and quality" test, but should be taken into account in the injury to competition and cost justification provisions of the statute. The minority of the Committee urged that "significant consumer preferences" be taken into account under the like grade and quality provision, treating demonstrable economic differences as calling for evaluation under "grade" as distinct from any purely physical consideration of "quality". Report of the Attorney General's National Committee to Study the Antitrust Laws 158-159 (1955).

⁵ In accord with the view of the majority of the Committee are Patman and Austin; Austin, *Price Discrimination Under the Robinson-Patman Act*, 39 (1959); Patman, *Complete Guide to the Robinson-Patman Act*, 23, 35 (1936). Rowe is of a contrary opinion. Rowe, *Price Discrimination Under the Robinson-Patman Act*, 76 (1962).

⁶ 346 U.S. 61, 63, 74.

are its physical characteristics. It is both proper and consistent with the broad antitrust policy of Congress that they be given recognition under the "like grade and quality" test of the Act. In determining whether products are of like grade and quality, consideration should be given to all commercially significant distinctions which affect market value, whether they be physical or promotional.

The Commission relies primarily upon this Court's opinion in *Hartley & Parker, Inc. v. Florida Beverage Corp.*, 307 F (2) 916 (5th Cir. 1962), a treble damage action in which we upheld the sufficiency of the charge in a complaint that the respondent discriminated in price by selling its nationally advertised liquors at one price while selling identical liquors under different labels to a favored customer at a lower price. That decision clearly does not control this case. The complaint which we upheld there affirmatively alleged that the products, although labeled differently were sold "upon the express representation that [the lower priced liquors] were in reality higher priced nationally advertised brands . . . packaged and labeled [fol. 983] under different trade names". The label differences were rendered commercially insignificant because both labels were represented and sold as one and the same product. In the present case, by contrast, the private label customers were forbidden to make any use of the Borden name in selling the private label milk and, so far as the record disclosed, they never represented the private brands to be Borden products. In this case, the brand name had commercial significance. Whatever significance the brand names might have had in *Hartley & Parker*, absent the seller's representation that the differently labeled products were the same was nullified by that representation.

We do not find the administrative precedents urged upon us by the Commission applicable to this case.⁷ Although

⁷ The Commission relies upon its line of decisions holding that goods which are the same in all respects except labels are of like grade and quality for the purposes of Section 2. *Page Dairy Co.*, 50 F.T.C. 395 (1953); *United States Rubber Co.*, 46 F.T.C. 998 (1950); *United States Rubber Co., et al.*,

it is true that these administrative decisions all treated goods of differing brands as being of like grade and quality, they are, however, clearly distinguishable from this case. In none of those cases was there any showing that the purchasers paying the higher prices had received brand-name products which readily commanded a premium price in the market, while the purchasers paying the lower prices did not. The brand names were not shown to have any effect on the ultimate price the products could command. Here the Borden brand label was clearly of commercial significance. At all levels of distribution it imparted a [fol. 984] premium market value to the Borden product which the private label product did not enjoy. That the Borden brand product should sell for a higher price than the lesser known private brands came as no surprise to anyone.

The Commission precedent would be of some weight if we were here holding that the mere affixing of different labels to physically identical products is sufficient to make them different in grade, but we do not so hold. It is only when those labels are proven to have demonstrable commercial significance that they can change the grade of a product. Different labels may be of no economic significance whatsoever. However, where it is demonstrated that a label enjoys a significant consumer acceptance such that buyers are willing to pay more for the product which bears that brand, then it is clearly of commercial significance in the most direct and obvious way—namely, it causes the product to sell for a consistently higher price in a competitive market. That is not to say that merely attaching different, but comparable brand labels to two products will, without more, make them of unlike “grade”. Such an artificial distinction, unaccompanied by any significant difference in the public acceptance of the two brands would provide an easy means of evading the Act. A manufacturer would be free to discriminate in price between purchasers

28 F.T.C. 1489 (1939); *The Goodyear Tire & Rubber Co.*, 22 F.T.C. 232 (1936), reversed on other grounds 101 F(2) 620 (6th Cir. 1939).

merely by affixing comparable, but different, private labels to the goods sold to each of them. We do not countenance such a practice, but merely recognize the demonstrated commercial significance of the Borden brand here, as com-[fol. 985] pared to the private label brands.⁸ The record shows that identification with the Borden Company through its brand name has value in the evaporated milk market. That value has been clearly proven by Borden in this case and it should be allowed to take it into account in pricing its products.

The Commission precedents which are more analogous to this case are those involving the closely related "meeting competition" defense under Section 2(b). There the Commission has given full recognition to the significance of the higher prices commanded by premium products in holding that a seller who reduces the price of his premium product to the level of his non-premium competitors is not merely meeting competition, but undercutting it.⁹ The

⁸ As pointed out by the Second Circuit in *Atlanta Trading Corp. v. F.T.C.*, 258 F(2) 365 (2nd Cir. 1958), "The test of products of like grade and quality was evolved to prevent emasculation of the section by a supplier's making artificial distinctions in his product but this does not mean that all distinctions are to be disregarded". In setting the Commission's order aside the Court held that certain pork products were not of like grade and quality, pointing out, among other things, that the Commission had failed to take account of the prices at which the products sold.

⁹ As the Commission stated in *Anheuser-Busch, Inc.*, 54 F.T.C. 277 (1957), "It is evident that Budweiser could and did successfully command a premium price in the St. Louis market as it has in most of the other markets in the nation. The test in such a case is not necessarily a difference in quality but the fact that the public is willing to buy the produce at a higher price in a normal market".

Similarly in *Standard Oil Co.*, 49 F.T.C. 923 (1953) the Commission stated, "There was no evidence as to whether or not Fleet Wing gasoline was of comparable grade or quality with respondent's gasoline. Regardless of this, in the retail distribution of gasoline public acceptance rather than chemi-

[fol. 986] most recent example is *Callaway Mills Co.*, 3 Trade Reg. Rep. Ph. 16800 (F.T.C. Feb. 10, 1964) where the Commission rejected the seller's meeting competition defense on the ground that it had failed to prove that its carpeting was "similar in grade and quality" to that of the competitor's whose prices it was meeting. The Commission stated that:

"Both the courts and the Commission have consistently denied the shelter of the [meeting competition] defense to sellers whose product, because of intrinsic superior quality or intense public demand, normally commands a price higher than that usually received by sellers of competitive goods".

The Commission apparently assigned to the "grade" concept the public demand or salability characteristics of a product and to the "quality" concept its intrinsic or physical characteristics. This approach cuts both ways. If it is appropriate in considering the grade and quality of products for purposes of Section 2(b), it is equally applicable to that determination under Section 2(a). We cannot approve of the Commission's construing the Act inconsistently from one case to the next, as appears most advantageous to its position in a particular case. The ambiguities of the Robinson-Patman Act are troublesome enough without further muddying the water through inconsistent administrative determinations dealing with important questions of law. Ultimately it is the Court which has the duty to decide such questions. As Justice Brandeis wrote, concurring in *St Joseph Stock Yards v. United States*, 298 U.S. 38, 84 (1936), "The supremacy of law demands that there shall be opportunity to have some court decide whether an erroneous [fol. 987] rule of law was applied and whether the proceedings in which facts were adjudicated was conducted regu-

cal analysis of the product is the important competitive factor."

See also *Minneapolis-Honeywell Regulator Co.*, 44 F.T.C. 351, rev'd on other grounds, 191 F(2) 786 (7th Cir., 1951), cert. dismissed, 344 U.S. 206 (1952).

larly." See also *United States v. Morgan*, 307 U.S. 183, 191 (1939).

Since the Commission's erroneous determination that the products were of like grade and quality was an essential element of its cease and desist order, the petition to set aside the order is granted. We do not render any decision on the other questions presented in the case. The Petitioner's arguments concerning injury to competition and its cost justification defense seems to have considerable merit, but we do not pass on them here. The holding that the products were not of like grade and quality requires us to set aside the Commission's order and make it unnecessary for us to consider the other points raised.

Petition to set aside the cease and desist order is

Granted.

[fol. 988] IN THE UNITED STATES COURT OF APPEALS FOR
THE FIFTH CIRCUIT

October Term, 1964

No. 20463

THE BORDEN COMPANY, Petitioner,

VERSUS

FEDERAL TRADE COMMISSION, Respondent.

On Petition for Review of an Order of the Federal Trade
Commission

Before HUTCHESON, RIVES and BROWN, Circuit Judges.

JUDGMENT—December 4, 1964

This cause came to be heard on the petition of The Borden Company, for review of an Order of the Federal Trade Commission issued on January 30, 1963, in Docket No. 7129, and was argued by counsel;

On Consideration Whereof, It is now here ordered, adjusted and decreed by this Court that the petition to set aside the cease and desist order in this cause be and the same is hereby, granted.

Issued as Mandate: Dec. 30, 1964.

[fol. 989] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 990] SUPREME COURT OF THE UNITED STATES,
OCTOBER TERM, 1964

No.

FEDERAL TRADE COMMISSION, Petitioner,

vs.

THE BORDEN COMPANY

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF
CERTIORARI—March 4, 1965

Upon Consideration of the application of counsel for
petitioner(/s),

It Is Ordered that the time for filing a petition for writ
of certiorari in the above-entitled cause be, and the same
is hereby, extended to and including May 3rd, 1965.

Hugo L. Black, Associate Justice of the Supreme
Court of the United States.

Dated this 4th day of March, 1965.

[fol. 991] SUPREME COURT OF THE UNITED STATES,
OCTOBER TERM, 1965

No. 106

FEDERAL TRADE COMMISSION, Petitioner,

v.

THE BORDEN COMPANY

ORDER ALLOWING CERTIORARI—October 11, 1965.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.